SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 299

MARS, INCORPORATED,

Petitioner,

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals for the Eighth Circuit:

Opinions Below.

The opinion of the District Court (R. 20) is reported in 49 Fed. Supp. 533.

The opinion of the Circuit Court of Appeals (R. 647) is reported in 135 F. 2d 843.

Jurisdiction.

The petition for rehearing filed by petitioner on May 15, 1943 (R. 673) was denied by the Circuit Court of Appeals on May 27, 1943 (R. 687).

The date of the original decree of the United States Circuit Court of Appeals was May 7, 1943 (R. 672).

Statement of the Case.

A concise statement of the case appears at pages 16 to 22 of the Petition for Writ of Certiorari, *supra*. In the interest of brevity, it is not repeated here.

Specification of Errors.

The Circuit Court of Appeals erred:

(1)

In holding that the trial court was clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

(2)

In holding that the trial court was clearly wrong in finding that Petitioner had not failed to prepare a statement as required by Section 11 of General Maximum Price Regulation.

(3)

In holding that the burden of proof was upon Petitioner to prove that it had not sold any of its candy bars at prices in excess of the highest price charged therefor by Petitioner in March, 1942.

(4)

In holding that Petitioner had not proven by competent testimony that it had not sold any of its candy bars at prices in excess of those charged by it for same in March, 1942.

(5)

In holding that the burden was upon Petitioner to prove that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(6)

In holding that Petitioner had not proven by competent testimony that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(7)

In holding that the trial court was clearly erroneous in its findings of fact.

(8)

In holding that the trial court erred in dismissing Respondent's Bill of Complaint.

(9)

In holding that the trial court should have issued an Injunction as prayed for by Respondent.

(10)

In reversing the judgment of the Trial Court.

(11)

In directing the trial Court to set aside the order of dismissal of Respondent's Bill of Complaint.

(12)

In directing the trial court to enter a decree enjoining Petitioner, its officers, agents, and employees from selling, delivering, or offering for sale or delivery any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942, and commanding the making of a statement of such highest March prices and maintenance of the same for inspection under the Regulation providing therefor.

(13)

In directing the issuance of a decree not authorized by the Emergency Price Control Act of 1942, nor by the General Maximum Price Regulation issued thereunder.

(14)

In directing the issuance of a decree not authorized by the Respondent's pleadings.

(15)

In holding that the highest price charged in March, 1942, for commodities sold by Petitioner should be determined upon the average weights of such commodities, instead of the lowest weight thereof.

(16)

In holding that the manufacturer's tolerance on Petitioner's candy bars is only 5%.

(17)

In holding that the lowest weight of any candy bar manufactured by Petitioner after May 11, 1942, must equal the average weight of such candy bar manufactured by it in March, 1942.

(18)

In holding that the trial Judge's finding of fact based upon the Western Weighing and Inspection Bureau agreement weights were clearly erroneous; that the evidence which should have been used was the invoices and bills of lading.

(19)

In holding that it could substitute a new theory of its own as the basis for the Injunction, in lieu of the Plaintiff's pleadings, proof and grounds on appeal.

(20)

In holding, in effect, that the Circuit Court has authority to authorize the Administrator of the Offices of Price Administration to order changes in business practices in industry, even though the Statute under consideration specifically prohibited the Administrator from compelling such changes in business practices.

Summary of Argument.

POINT ONE.

The District Court was not clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

A. Petitioner Proved Without Contradiction That The Price Per Bar Was Not Increased.

B. Petitioner Proved Without Contradiction That Individual Candy Bars Manufactured After March, 1942, Weighed More Than Those Manufactured In March.

C. Petitioner Proved Without Contradiction That From May To December 1942, It Actually Used More Ingredients By Weight Per 24 Bars Than It Had Used In March, 1942.

POINT TWO.

Neither the Emergency Price Control Act nor the General Maximum Price Regulation makes any exception to March, 1942, ceiling prices on account of either manufacturing methods or formulae changes.

POINT THREE.

Respondent did not offer evidence from which the trial court could have found that Petitioner increased its prices above the March, 1942, ceiling.

A. Respondent's Case Was Based Upon False Premise.

B. Respondent's Evidence Was Predicted Upon Inaccurate Average Shipping Weights, Which Had Nothing To Do With The Selling Price.

C. Respondent Offered No Evidence As To Actual Or Accurate Weights.

D. Trial Court Could Find No Basis In Respondent's Evidence That Petitioner Had Increased The Price Of Its Commodities.

POINT FOUR.

Since the undisputed testimony showed that the weights on petitioner's invoices and bills of lading during March, 1942, were merely averages, and were not accurate with respect to the actual weight of any candy bar, box, or carton thereof, manufactured and sold by Petitioner during March, 1942, the Circuit Court of Appeals was not authorized by the General Maximum Price Regulation to direct the District Court to enjoin Petitioner "from selling, delivering or offering for sale or delivery any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942."

POINT FIVE.

The Circuit Court was not authorized to grant relief upon a new theory of its own which was neither plead, proved, nor relied upon by Appellant upon appeal.

POINT SIX.

The Circuit Court was not authorized, on behalf of the Administrator of the Office of Price Administration, to compel far reaching changes in industry, since the Statute, being construed specifically prohibited the compelling of such changes.

POINT SEVEN.

The Circuit Court of Appeals was not authorized to find that the invoices and bills of lading weights were correct,

and the Western Weighing and Inspection Bureau Agreement weights were incorrect, when the Respondent, supported by the record, considered these weights as identical.

POINT EIGHT.

The Circuit Court was not authorized to enter a decree that had no basis in either the pleadings nor evidence offered by the Respondent.

POINT NINE.

The Circuit Court of Appeals was not authorized to set aside the finding of the trial Judge that the Respondent had failed to prove his Second Count, to-wit, that Petitioner failed to prepare a correct statement showing the highest price charged for its commodities delivered during March, 1942.

ARGUMENT.

POINT ONE.

The District Court was not clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

A. Petitioner Proved Without Contradiction That The Price Per Bar Was Not Increased.

B. Petitioner Proved Without Contradiction That Individual Candy Bars Manufactured After March, 1942, Weighed More Than Those Manufactured In March.

C. Petitioner Proved Without Contradiction That From May to December 1942, It Actually Used More Ingredients By Weight Per 24 Bars Than It Had Used In March, 1942.

A. Petitioner Proved Without Contradiction That The Price Per Bar Was Not Increased.

It is undisputed that the price of the commodity sold by Petitioner remained the same throughout March, the base period, and for the subsequent time, to date (Hoben, R. 142, 232). The price at which the candy was sold was 68 cents per twenty-four bars (Hoben, R. 230-232). The Respondent admits that the price remained constant (Reiser's affidavit, R. 605).

B. Petitioner Proved Without Contradiction That Individual Candy Bars Manufactured After March, 1942, Weighed More Than Those Manufactured In March.

The Company proved, without contradiction, that as to a group of random sample bars, that the candy bars manufactured after March were appreciably increased in weight over those made in the month of March (R. 254). The witness Hoben testified that he personally weighed the sample bars. He answered the question quoted as follows:

> "Q. State whether or not in each and every instance the bars which you weighed, which were manufactured on May 11th or from that period through December 30th, were as heavy or heavier than at least one of the bars which you weighed in March?"
>
> "A. In each case, all of the bars which I weighed and which are shown on this chart were at least as heavy or heavier than bars of the same flavor which I weighed which were manufactured in March" (R. 254).

The Defendant's (Petitioner's) Exhibits 29 through 34 (R. 583-588) show the exact actual weight of each individual bar. Respondent's counsel voluntarily agreed to

raise no question about the weighing of these random sample bars (Walsh's Statement, R. 253).

The Defendant's (Petitioner's) Exhibit 36 (R. 590) shows graphically the lowest weight of each bar in each flavor. In *every* case, the lowest weight bar was made in March. In *every* case, the individual sample bars manufactured during the period from May 11 to December 30, 1942, weighed *more* than did at least *one* of the March bars.

The actual random sample bars were in the court room. The scales used for weighing them were in the Court room (R. 252). Some of these sample bars were introduced in evidence (R. 252). (It was only a desire to save unnecessary encumbrance of the record with physical exhibits that influenced the Company not to introduce all of the bars). The witness was ready to demonstrate the accuracy of his weighing, but the Administrator's counsel hastily conceded that no point would be raised on the subject (R. 253).

C. Petitioner Proved Without Contradiction That From May To December, 1942 It Actually Used More Ingredients By Weight Per 24 Bars Than It Had Used In March, 1942.

Although the Company never conceded that weight was the sole criterion upon which to consider the price of five-cent candy bars, nevertheless the Company did prove conclusively that it actually used *more* ingredients by weight per twenty-four bars than it had used in March. (The twenty-four bar basis was used purely for convenience in computation.) This showing is very significant as to the Company's *attitude* and its *intentions*.

The witness Sterns identified and verified figures showing the total poundage of ingredients that went into the candy from March 2, 1942 through December 31, 1942. He computed the poundage per twenty-four bars, by dividing

the total units of twenty-four bar boxes into the total ingredients used, for the respective periods shown (R. 212). A tabulation was presented as Defendant's (Petitioner's) Exhibit 9 (R. 554) which shows the results of this computation.

Mr. Sterns prepared a graphic chart upon which a red line appeared to indicate the ingredient changes, and a blue line appeared to indicate the March base. This chart was Defendant's (Petitioner's) Exhibit 10 (R. 555). Since the Record as prepared by Respondent does not show the blue line at all, the Petitioner has prepared the chart correctly and has included it in the Supplemental Record (R. page 596A).

Mr. Sterns explained that it was necessary to break March up into several periods, since there were appreciable variations in the ingredient content of the candy during March (R. 212). He stated that the low point in March was from March 23 to March 31, so he took that period for the "March Base" (R. 212). Incidentally, this testimony is corroborated by Mr. Hoben's statement that an ingredient reduction was made on March 23, to reduce the amount of chocolate coating (R. 246).

The record proves, without contradiction, that from May 11, 1942 through December 31, 1942 the Company actually used more ingredients per twenty-four bars than it had used during the last eight days in March (See colored chart at R. 596A).

The use of more ingredients from May 11 to December 31, 1942 is corroborated by the fact that the random sample bars taken from May 11 to December 31 were all heavier than were the sample bars taken in March (R. 583-590).

Mr. Sterns testified that his records, computations, and visual charts as to what went into the candy were based upon *actual weights*, and that he had carefully checked his records to make sure that they were correct (R. 207, 213).

He testified that he used no averages, no approximations, no interpretations, and no determinations, but only the *exact weight of what went into the candy* (R. 207).

Point Two.

Neither the Emergency Price Control Act nor the General Maximum Price Regulation makes any exception to March, 1942 ceiling prices, on account of either manufacturing methods or formulae changes.

The Circuit Court of Appeals, in holding that the burden of proof was upon Petitioner to show that any supposed reduction in weight was occasioned by either manufacturing methods or formulae changes necessitated by war conditions, has confused a compensated reduction in weight whereby no increase in price occurs, with an authorized increase in price. The fallacy of this is obvious.

In the first place, neither the Emergency Price Control Act nor the General Maximum Price Regulation makes weight the criterion for determining price. As a matter of fact, neither of them mentions weight.

The only exception permitted by the Emergency Price Control Act and the General Maximum Price Regulation is an increase in price authorized by the Office of Price Administration after formal application therefor. Obviously, the burden of proof to establish such an exception would be upon Petitioner; but testimony with respect to variations in weight due to manufacturing conditions and to changes in formulae necessitated by war conditions, could only be relevant as establishing the fact that Petitioner had not increased the price of the commodities sold by it above the March, 1942 ceiling price. No amount of testimony with respect to manufacturing methods or formulae changes would suffice to justify an increase in price.

The orders of the Office of Price Administration granting price adjustments to Petitioner's competitors permitted

uncompensated weight reductions—that is, weight reductions without any change in formulae. For example, in granting Peter Paul, Inc., the right to reduce the weight of its "Mounds" bar by 30% without any decrease in price, the Office of Price Administration made the following condition:

> "Authorization to reduce the size of Mounds is given on the specific condition that in reducing the size of this bar Peter Paul, Inc., shall not change or alter its formula for such bar in any manner" (*8 Fed. Register, 1636*) (R. 624).

In other words, the Office of Price Administration recognizes that changes in ingredients or proportions thereof might result in a price increase, irrespective of any change in weight. As a matter of fact, it is perfectly obvious that there might be an actual increase in weight and yet also an increase in price as result of inferior ingredients.

Now, then, can it be said that because the Respondent chose to offer evidence with respect to weight alone, the burden of proof was thereby shifted to Petitioner to disprove an increase in price resulting from any other factor, such as formulae changes or manufacturing methods? We submit that the burden of proof was upon Respondent to prove the price increase, and that this burden never shifted. Respondent could not choose to introduce evidence with respect to the factor of weight alone, and then insist that the burden of proof was upon Petitioner with respect to all other factors relevant to the ultimate issue of price increase.

However, as we have pointed out above, Petitioner offered evidence which not only justified, but in fact required the District Court to find that there had been no price increase by Petitioner.

As was cogently said by this Court in the recent case of *Commercial Corporation* v. *New York Barge Corp.*, 314 U. S. 104,

> "The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence."

Since this Court has seen fit to cite with approval from that eminent author, Wigmore, we deem it proper to refer to his discussion on the matter of burden of proof. He points out that the determination of this question is usually from the pleadings in the case, from which it can be determined who is desirous of having action taken by the Court. It is a simple matter to determine from the pleadings in this case who was desirous of having action taken. Respondent alleged that:

> "defendant has increased the price of all commodities sold and delivered by it * * * in excess of the highest prices charged therefor by defendant during the month of March, 1942" (R. 3);

and prayed that Defendant be enjoined "from directly or indirectly selling, delivering, or offering for sale or delivery any candy bar at prices in excess of those established by the General Maximum Price Regulation" (R. 3).

Manifestly, Respondent rather than Petitioner was desirous of having action taken by the Court, and if he was unable to convince the trial court (the trier of facts in this case) of the truth of his allegations, then he was not entitled to have the desired action taken by the Court. (*IX Wigmore On Evidence, Third Edition, Sec. 2485*).

The party having the burden of proof, or as Wigmore says, the "risk of nonpersuasion", is naturally the one upon whom first falls the duty of going forward with the evidence, because since he wishes to have the Court find for him, and since without any legal evidence at all the Court could properly take no action, there is no need for the defendant to adduce evidence. (*IX Wigmore on Evidence, Third Edition, Sec. 2487*).

(*Lillienthal* v. *U. S.*, 97 U. S. 237);

(*Omaha Hotel Co.* v. *Wade*, 97 U. S. 13);
(*Davis* v. *O'Hara*, 266 U. S. 314);
(*Reliance Life Ins. Co.* v. *Burgess*, 112 Fed. (2) 234, Certiorari denied, 311 U. S. 599).

Applying this rule to the first issue made by the pleadings, the duty rested upon Respondent to produce evidence from which the trial court could legitimately find that the Petitioner had sold its candy bars at prices in excess of those established by the General Maximum Price Regulation. If Respondent's testimony reached this point, and we earnestly contend that it never did reach a point where the Court could legitimately find for Respondent on this issue, then Respondent would have merely discharged his obligation to go forward with the evidence and there would be no duty on either party to produce evidence. Either party might do so, but there would be nothing that would require Petitioner to do so under penalty of a ruling of law against it. The risk of nonpersuasion was still with Respondent—that is, should the court be in doubt, after hearing the evidence of Respondent as to this issue, either with or without evidence from the Petitioner, Respondent would fail to obtain a finding upon that issue, and Petitioner would remain successful. *(IX Wigmore on Evidence, Third Edition, Sec. 2487).*

Point Three.

Respondent did not offer evidence from which the trial court could have found that Petitioner increased its prices above the March, 1942 ceiling.

A. Respondent's Case Was Based Upon False Premise.

B. Respondent's Evidence Was Predicated Upon Inaccurate Average Shipping Weights, Which Had Nothing To Do With The Selling Price.

C. Respondent Offered No Evidence As To Actual Or Accurate Weights.

D. Trial Court Could Find No Basis In Respondent's Evidence That Petitioner Had Increased The Price Of Its Commodities.

A. Respondent's Case Was Based Upon False Premise.

Respondent plead:

> "that all of the bars of candy of the same kind, and boxes and cartons thereof, sold and delivered by the Defendant as aforesaid, contained exactly the same ingredients and were exactly the same size and weight during each and every day of the entire month of March, 1942." (R. 2).

The undisputed testimony in the case was exactly the converse of this allegation.

Respondent then alleged:

> "that on and after May 11, 1942 each and every candy bar manufactured, sold and delivered by Defendant as aforesaid was materially reduced in size and weight, and as a result thereof all purchasers of said candy bars and boxes and cartons thereof, have received since May 11, 1942 approximately 11% less candy than they received during the month of March, 1942." (R. 2 and 3).

The witness, Hoben, testified that the first of the above statements as quoted from the complaint was "decidedly not true" (R. 224) and why it was not true (R. 224-227). He stated that variances of ¼ to ½ ounce were normal in the Company's bars (R. 428). The trial court made the statement that he would be surprised if the Plaintiff made the contention in argument that "two candy bars weighed

the same amount to a milligram." (R. 255). Respondent's counsel said in his argument:

> "I am glad that Your Honor anticipated that it would not be the contention of any person on this side of the table, in the presentation of this matter to you that this concern could attempt to manufacture a two and one-half ounce candy bar and in a production of one billion candy bars in it exactly and precisely every time. Any person with a mind, scientific or otherwise, and possessed only with a reasonable mind knows that the human hand and the human mind has not yet achieved that degree of perfection." (R. 613).

B. Respondent's Evidence Was Predicated Upon Inaccurate Average Shipping Weights Which Had Nothing To Do With The Selling Price.

Just how inaccurate these weight determinations actually were can be seen from an examination of the record. We set this out fully under Point Four *infra*.

Respondent offered no testimony as to the weight of any candy bar or box or carton thereof, either manufactured or sold in March, 1942 or since May 11, 1942. The only evidence offered by Respondent with respect to the weight of candy bars or boxes or cartons thereof manufactured and sold by Petitioner, was evidence showing that Petitioner had, for convenience in shipping, entered into an agreement with the Western Weighing & Inspection Bureau whereby the latter, from time to time, made tests or determinations to ascertain the average weight of cartons of candy shipped by Petitioner (R. 103-105). The evidence with respect to these weight determinations clearly discloses that they were not accurate and were not supposed to be accurate with respect to the weight of any particular candy bar or box of candy or carton of candy (R. 104-106, 194-198, 259-260, 264, 549). After these determinations were made, the evidence showed, they were used on Petitioner's invoices in order to

determine the freight to be paid by Petitioner. A consignee had no interest in these weight determinations, since Petitioner paid all freight charges.

C. Respondent Offered No Evidence As To Actual or Accurate Weights.

Petitioner submits that if shipping weight is to be considered as the sole criterion for determining price, then it was necessary for Respondent to prove actual, rather than average weights. As a matter of fact, this is true even though weight is simply one of the factors and not the sole factor in determining price.

In granting price adjustments to Petitioner's competitors, the Respondent has done so on the basis of actual, rather than average shipping weights. For example, the order granting the application of Peter Paul, Inc., reads in part as follows:

> "Peter Paul, Inc., Naugatuck, Connecticut, is hereby authorized to reduce the size of its chocolate covered coconut bar, known as "Mounds" packed 24 to the box, from 2½ ounces to 1¾ ounces net *per bar*, and sell such 1¾ ounce bar at a maximum price no higher than that established for its 2½ ounce bar pursuant to the General Maximum Price Regulation." *(8 Fed. Register, 1636)* (R. 625).

A mere showing of average shipping weights would have no probative value on determination of the highest price charged by Petitioner for its candy bars during March, 1942. If Respondent's theory in this case (contrary to his theory in the granting of price adjustments) be adopted, and shipping weight be considered as the sole criterion for determining the price of the Petitioner's bars, then it was incumbent upon Respondent to prove what was the lowest weight candy bar of each flavor sold by Petitioner in March, 1942, and then to prove the sale of candy bars of less than

such weight since the effective date of the General Maximum Price Regulation. But the only testimony with respect to actual weights of candy bars manufactured by Petitioner in March, 1942 was offered by the Petitioner (R. 252-254), (R. 583-590); and furthermore, the only testimony offered with respect to the actual weight of candy bars manufactured by Mars, Incorporated subsequent to the effective date of the General Maximum Price Regulation was offered by the Petitioner (*ibid*). Likewise, the only accurate testimony with respect to the average shipping weights of Petitioner's candy bars in March, 1942 and for the period subsequent to the effective date of the General Maximum Price Regulation, was offered by Petitioner (R. 203, 550, 551).

D. Trial Court Could Find No Basis In Respondent's Evidence That Petitioner Had Increased The Price Of Its Commodities.

Demonstrative of the fact that the evidence offered by Respondent was not persuasive of the existence of a price increase is the following quotation from the opinion of the District Court:

> "It is clear, moreover, that if the change in weight results from the substitution of one ingredient for another (because, for example, a particular ingredient, as sugar, no longer is available as fully as before), the decrease in weight might have no relation to cost of manufacture. The new, lighter ingredient might cost more than the old, heavier ingredient." (R. 22).

The District Court recognized the fact that the burden was upon the Respondent to prove that the alleged price increase resulted from other changes in the commodities manufactured and sold by Petitioner. The Court will remember that Respondent alleged that these commodities "contained exactly the same ingredients * * * during

each and every day of the entire month of March, 1942."

The District Judge said:

> "There has been no negation of other possibilities that might have effected so slight a decrease in weight." (R. 22).

There is little wonder that Judge Otis was not convinced that there had been a price increase. The only method by which he could have arrived at such a conclusion would have been as a result of speculation and conjecture. With the testimony in this condition, the trial court could not find for the Respondent that there had been a price increase.

And yet, the Circuit Court of Appeals, on the basis of this inconclusive testimony offered by Respondent, and in spite of the uncontradicted testimony offered by Petitioner, has seen fit to set aside as clearly erroneous, the finding of the trial court that there had been no increase in the price of Petitioner's commodities. We do not believe that it was ever the intention of this Court, in adopting Rule 52 (a) of the *Rules of Civil Procedure*, to permit such action by a Circuit Court of Appeals as has been taken by the Circuit Court of Appeals in setting aside the findings of fact by Judge Otis.

Point Four.

Since the undisputed testimony showed that the weights on Petitioner's invoices and bills of lading during March, 1942 were merely averages and were not accurate with respect to the actual weight of any candy bar, box, or carton thereof, manufactured and sold by Petitioner during March, 1942, the Circuit Court of Appeals was not authorized by the General Maximum Price Regulation to direct the District Court to enjoin Petitioner "from selling, delivering, or offering for sale or delivery any candy bars

at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942.''

Proof of the inaccuracy of the weights as shown upon the invoices and bills of lading is inescapable. At no time has the Respondent ever offered any evidence that these weights were accurate, nor did the Circuit Court cite any portion of the record to indicate that these weights were accurate.

Just how inaccurate the shipping weights as used upon the invoices and bills of lading actually are is apparent from a review of the record. There are facts in evidence which prove that these Western Weighing and Inspection Bureau certified weights, as used upon the invoices and bills of lading were sufficient for shipping purposes, but were *totally inaccurate and unreliable when used as a method for determining the exact weight* of the candy. These facts in evidence are:

(1) The man who did the weighing testified for the Respondent that some of the cartons weighed were not included in the averages, and that he made inquiry only when he found ''great differences'' in weights as between those in use, and those disclosed by the then average weights (R. 104-106).

(2) Taking into consideration the explanation offered as to how the weighing was done, a difference in carton weights of ''Dr. I.Q.'' candy bars of six pounds as between the fourth and fifth carton weighed is found at the weighing done on March 31, 1942. This is a variation of some 16% (R. 105, 304).

(3) Of the total candy produced at the estimated rate of 11,000 cartons per day (R. 188) for a 300-day year, the total annual production would be approximately 3,300,000 cartons. According to the Respondent's witness

Tranker, and the weight certificates in evidence, only about 2,200 cartons were weighed annually (R. 292-330). 2,200 is only .066% of 3,300,000. Thus, if the weigher found a 16% variation in only two cartons out of the 66/1000 of 1% examined, quite obviously there was an insufficient number weighed to secure a dependable average for pricing purposes.

(4) The Respondent's witness Ewing admitted that the method of weighing used by the Western Weighing and Inspection Bureau was not the most accurate method available for determining true averages (R. 173). Furthermore, Ewing confessed that insofar as the Western Weighing and Inspection Bureau was in error, that *all of the Respondent's computations and analyses* based upon these averages, *were also in error* (R. 173).

(5) There is uncontradicted testimony by the Secretary of Mars, Incorporated, that the actual average shipping weights would run "over and under" the weights as established by Western Weighing and Inspection Bureau at various times (R. 264).

(6) Variations in weight of the candy caused by normal manufacturing practices, substitutions because of war time shortages, and container material variations, were constant. As to the normal manufacturing variances, and substitutions because of war time shortages, the testimony was explicit and uncontradicted (R. 224-227, 238-240, 244-249). A Civil Service employe of the United States Forest Products Laboratories testified, without contradiction, that a range of 14.1 ounces variation would be expected in the container materials alone (R. 181-182).

(7) Absolute proof of the inaccuracy of the weights as shown upon the invoices and bills of lading is shown by the actual weighing of eleven carloads of candy. The

testimony in this connection is clear, uncontradicted, and conclusive (R. 194-198, 259-260, 549). A chart which was introduced in evidence shows the full information as to the car numbers, dates of weighing, gross and net car weights, actual net content weights compared with the weights as shown upon the invoices and bills of lading, etc. (R. 549). Four columns taken from that chart, with designation changes for clarification, show:

Car Number	Actual Net Content Weight	Invoice and Bill of Lading Weights	Error in Invoices & Bill of Lading Billing	Assortment Content
1127	70,520	69,487½	1032½ (over)	Asst. No. 1
1100	69,420	69,487½	67½ (under)	Asst. No. 1
1220	68,040	67,855	185 (over)	Asst. No. 2
1044	67,480	67,855	375 (under)	Asst. No. 2
1134	70,180	69,487½	692½ (over)	Asst. No. 1
1004	69,720	69,487½	232½ (over)	Asst. No. 1
1217	69,540	69,487½	52½ (over)	Asst. No. 1
1129	70,100	69,487½	612½ (over)	Asst. No. 1
1196	69,100	69,487½	387½ (under)	Asst. No. 1
1075	69,740	69,487½	252½ (over)	Asst. No. 1
1191	70,120	67,855	2265 (over)	Asst. No. 2

It will be noted that Assortment No. 1 always is shown on the invoices and bills of lading, made in accordance with the Western Weighing and Inspection Bureau agreement averages, at a weight of 69,487½ pounds, but that the actual weight of this assortment in only eight cars varied from a high of 70,520 to a low of 69,100 pounds—a difference between the first car and the ninth car of 1420 pounds. On Assortment No. 2, the difference between the fourth car and the eleventh car is 2640 pounds. Since there were only 1300 cartons of candy in each assortment, this indicates an average difference of slightly more than *two pounds per carton*, between the candy in the fourth and the eleventh car. If there is this great a difference when the candy is averaged by using 1300 cartons as a unit for averaging, the difference between single cartons, single twenty-four bar boxes and individual bars must have been much greater.

This is clear, uncontradicted, explicit proof that the weight shown upon *every invoice and bill of lading* used in shipping out the 4,118,400 individual candy bars, contained in the 14,300 shipping cartons, which were loaded into the eleven freight cars *was absolutely wrong*, and *wholly inaccurate* (R. 549).

A recapitulation of the seven points enumerated above shows that constant fluctuations in the weight of raw materials, individual bars, container materials, shipping cartons, and carload lots were normal and unavoidable. All commercial shippers and all carriers recognize this fact. Neither *shippers nor carriers would ever contend that estimated shipping weights established by weighing agreements were accurate.*

A weight disclosed by scales governs over a weight shown in the bill of lading. (*Baird* v. *St. Louis I. M. & S. Ry. Co.*, 41 F. 592.)

The purpose of estimated weights is to avoid the delay, expense and labor incident to the actual weighing of each particular shipment. (*Davis* v. *Ill. Central Ry. Co.*, 16 I. C. C. 376.)

If the commodity is not susceptible of a reasonably accurate estimated weight, there should be sufficient margin between the minimum and maximum weights to allow for reasonable variations between the estimated and the actual weights. Actual weighing is the only way in which weight can be ascertained to a certainty, but this practice is not always convenient, practical or even advisable. (*Georgia Rough & Cut Stone Co.* v. *Georgia Ry. Co.*, 13 I. C. C. 401.)

Under the provisions of the Bill of Lading Act, the shipper is bound by the recitations in the bill of lading only when marked "shipper's weight, load and count" (Aug. 29, 1916 c. 415, Sec. 20, 39 Stat. 541). No such wording, nor comparable nor similar wording appears upon the bills of lading used by Petitioner. (R. 562). In the absence

of such wording, the weight shown is actually the weight as established by the railroad. Tranker, the inspector for Western Weighing and Inspection Bureau, who was called as a witness by Respondent, testified that he made the weight determinations, *in advance,* and that in performing that service *he was working for the railroads* (R. 105, 106). The record shows that in every instance the Company accepted and used the weights *exactly as determined by this representative of the railroads.* (R. 291-330).

In effect, the Circuit Court by its decision has ruled that an inaccurate and inexact broad shipping average, determined by the carrier for convenience in handling, must be accepted by a manufacturer as the sole basis for determining the selling price of his commodity. The basic fact is ignored by the Circuit Court, that neither the shipper nor carrier ever thought that there was the most remote possibility that they were establishing a selling price as between the manufacturer and the purchaser when they made an agreement to use estimated average shipping weights for shipping purposes. Also ignored by the Circuit Court is the fact that as between the manufacturer and purchaser, an entirely different method of pricing was used in which the railroad carrier had no interest whatsoever. (R. 91, 114). The Circuit Court has wholly failed to grasp the vast distinction between using rough averages for *shipping* purposes (where the purchaser was not involved, since the manufacturer paid all the freight charges) and using a similar rough average shipping weight for *selling* purposes.

In the sale of Stetson Hats as the District Court pointed out, (R. 23) the wholesaler would not be a law violator if the May hats weighed each an ounce less than the March hats.

Surely, in the sale of diamond rings, fur coats, or soft drinks, the price could not be said to have been established by the adoption of a shipping agreement average between

the manufacturer and the carrier, where the shipper paid the freight charges, and the purchaser had no interest in either the shipping weight nor the amount charged for transportation.

To imagine the adoption of such a rule as the Circuit Court has ordered is to envision chaos. Yet, if the Circuit Court can ignore the established business practices in the food industry, and compel a complete change in the traditional, established methods of doing business there, then the Circuit Court must have identical power to order such a change in any other industry. It staggers the imagination to contemplate the resulting catastrophe in American business if the Administrator of the Office of Price Administration decides to regulate the diamond, fur coat, soft drink, hat, automotive, locomotive, and wrist-watch businesses by fixing the price of all commodities in each of these industries in accordance with the average shipping weight of each such commodity in March of 1942. This seems too absurd to consider, yet the fixing of the sale price of five-cent candy bars in accordance with the estimated shipping weight averages of the gross shipping containers *is equally as absurd.*

From the opinion of the Circuit Court of Appeals, it is manifest that that court concluded that weight was the sole criterion for determining the price of the commodities sold by Petitioner; and since the only weight shown on Petitioner's invoices and bills of lading in March, 1942 were average weights, admittedly inaccurate as to the actual weight of any candy bar or box or carton thereof manufactured and sold by Petitioner during March, 1942, the effect of the decision of the Circuit Court of Appeals is to enjoin the Petitioner from selling any candy bar or box or carton thereof with a weight less than the *average weight* thereof in March, 1942.

The effect of this is to impose an impossible burden upon Petitioner, since the undisputed testimony showed that there was an uncontrollable variation of ¼ to ½ an ounce per bar, and of several pounds per carton, and of several thousand pounds per carload, of candy bars manufactured and sold by Petitioner, it will be necessary for Petitioner, in order to comply with the injunction directed to be issued by the Circuit Court of Appeals, to keep the lowest weight of any candy bar or box or carton thereof, manufactured by it, up to the average weight of the candy bars and boxes and cartons thereof manufactured by it during March, 1942. In view of the uncontrollable variation in weights, this will mean that the average weight of candy bars manufactured by Petitioner under the decree directed to be issued by the Circuit Court of Appeals, will necessarily considerably exceed the average weight of the candy bars manufactured and sold by Petitioner in March, 1942.

Furthermore, Respondent's pleading does not authorize the decree directed to be issued by the Circuit Court of Appeals. The prayer is that the Petitioner be enjoined from selling any candy bars "at prices in excess of those established by the General Maximum Price Regulation", which translated to this case as conceived by the Circuit Court of Appeals would mean that the Petitioner be enjoined from selling any candy bar at weights less than the lowest weight of any candy bar manufactured and sold by Petitioner in March, 1942. But the injunction directed to be issued by the Circuit Court of Appeals is against sales in excess of an *average price* (or average weight) (R. 670) whereas, the injunction prayed for by Respondent was against sales in excess of the *highest* price (lowest weight) charged (R. 3, 4).

Point Five.

The Circuit Court was not authorized to grant relief upon a new theory of its own which was neither plead, proved, nor relied upon by Appellant upon appeal.

Judge Gardner, speaking for the Eighth Circuit in *Ramming Real Estate Co.* v. *U. S.*, 122 F. 2d 892, held:

> "It is well settled that the theory upon which the case was tried in the Court below must be adhered to upon appeal."

The cases are in agreement that where the suit was brought upon one theory in the court below, that on review the Plaintiff cannot change to another theory which the Defendant was not required to meet below. *Virginia Railroad Co.* v. *Mullens*, 271 U. S. 220, 70 L. Ed. 915, 46 S. Ct. 526; *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 76 L. Ed. 256, 52 S. Ct. 115; *Peck* v. *Henrich*, 167 U. S. 624, 42 L. Ed. 302, 17 S. Ct. 927; *Foster* v. *Special Site Sign Co.*, 85 F. 2d 742, certiorari denied 57 S. Ct. 315, 299 U. S. 613, 81 L. Ed. 452.

If the Plaintiff cannot change the theory of the right of recovery upon appeal, then surely the Circuit Court cannot lawfully do so. Yet, that is exactly what the Circuit Court did here. Recovery was predicated upon a wholly erroneous assumption; that is, that there was a distinction between the weights as shown upon the weight determinations of Western Weighing and Inspection Bureau and the weights of the invoices and bills of lading. (R. 670). Upon this incorrect assumption, the Circuit Court changed the theory of the Plaintiff's right of recovery from a claimed price increase above March 1942 highest prices, to a claimed weight reduction below the *average* shipping weights in March of 1942.

By a metamorphosis of the Circuit Court, the average shipping weights established in January of 1942 *for ship-*

ping purposes only, have been transformed into the highest prices in March for selling and delivery purposes. We respectfully suggest that the Circuit Court is without authority to engage in such legerdemain.

POINT SIX.

The Circuit Court was not authorized, on behalf of the Administrator of the Office of Price Administration, to compel far-reaching changes in industry, since the Statute, being construed specifically, prohibited the compelling of such changes.

As is set out in our petition for certiorari the Circuit Court has ignored subsection (h) of the Emergency Price Control Act *(50 U. S. C. A. App. Sec. 901 to 946)* which prohibits the Administrator of the Office of Price Administration from compelling changes in business practices, cost practices, or means of distribution, established in any industry, except to prevent circumvention or evasion of any regulation. There is no claim made that the changes enumerated in our petition for certiorari were ordered to prevent circumvention or evasion. So, it would appear there is no justification for the Circuit Court by judicial decree having performed a ministerial act for the Administrator which he could not lawfully perform for himself.

This provision, which prohibits changes in business practices was inserted to protect industry from the very abuses that have been sanctioned here. This provision was inserted by the House Committee H. R. 5990, 77th Congress, 1st Session (1941), eliminated by the Senate Committee H. R. 5990, 77th Congress 2d Session (Jan. 2, 1942) and restored on the floor of the senate H. R. 5990 77th Congress 2d Session (January 12, 1942).

During the Senate debate, Senator Vandenberg explained this section by saying: "In other words there is an effort

to draw a distinct line between a traditional, standard, appropriate, habitual business practice and one which might be invoked to evade this new control" (88th Cong. Rec. Jan. 8, 1942, p. 108; 9 Pike & Fisher OPA Service 700: 128).

If we can accept Senator Vandenberg's statement as the basis upon which this section was restored as a part of the Statute, it becomes apparent that the Circuit Court has done the very thing that Congress said should *not* be done.

The evidence in this case shows that the "traditional, standard, appropriate, habitual, business practice" in the candy industry was for the manufacturer to sell his product upon an individual bar basis, packed a given number of bars in a box for convenience in shipping and handling. Dealers in candy, who testified for Respondent, called this a "count per box" basis. (R. 91, 114). These dealers said that they never weighed the candy, that they were interested only in the *count per box;* that is, how many nickel candy bars they received. (R. 91, 114). Every invoice introduced in evidence showed that the invoices carried the designation printed upon their face "—Boxes 24 Count 5¢ Milky Way." (R. 350-475.) The sample invoice introduced in evidence, shows the same designation. (R. 228-229, 556, 557). The Secretary of Mars, Incorporated testified:

> "We do business on a candy bar basis; we manufacture and sell and ship it on that basis." (R. 228).

Now, the "traditional, standard, appropriate, habitual business practice" has been changed. No longer can the candy industry—unless Mars, Incorporated has been discriminated against—sell upon the traditional method of a count per box basis of individual candy bars. Now, by official decree of the Circuit Court, the sale must be in accordance with the "invoices and accepted bills of lading which showed the weights at which the candy was shipped." (R.

670). Furthermore, the traditional method of writing up invoices in advance, the traditional variations permitted between individual bars, the traditional tolerances permitted on shipping weight agreement, have all been outmoded by this Circuit Court opinion. (See our Petition for Certiorari, under Point Five.) The fact that the Circuit Court confused traditional variations of from 10% to 20% as between individual bars, with the variation of 5% permitted between actual and billed shipping weights, did not interest that Court sufficiently to cause it to correct that mistake, even when this was specifically called to the Court's attention in Petition for Rehearing. (R. 683-686).

Point Seven

The Circuit Court of Appeals was not authorized to find that the invoices and bills of lading weights were correct, and the Western Weighing and Inspection Bureau Agreement weights were incorrect, when the Respondent, supported by the record, considered these weights as identical.

The Circuit Court condemns the findings of the trial court as "clearly erroneous" because these findings are based upon "certified weights" and says that, "the evidence which should have been used is the invoices and accepted bills of lading showed the weights at which the candy was shipped" (R. 670).

This is a most unfortunate error. By "certified weights" the Circuit Court is referring to the weights as established by the Western Weighing and Inspection Bureau. The Circuit Court has overlooked the fact that the sole basis for the "Invoices and accepted bills of lading weights" is the very "certified weights" which it has just condemned.

These record references are covered rather completely in our petition for certionari under Point Three. We shall not repeat them here.

We copy a short excerpt from the Appellant's Brief in the Circuit Court at page 15 where the Respondent recognizes that the Bureau, invoice, and bill of lading weights are identical by saying:

> "The documentary proof of the Administrator consisted of hundreds of invoices and bills of lading for individual shipments (B. 1, 537 and B. 2 complete) showing upon their face the Company's carton shipping weights * * *. Basic to this phase of the Administrator's proof was his showing that the shipping weights inscribed on the invoices and bills of lading were weights computed for Mars at frequent and periodic intervals by the Western Weighing and Inspection Bureau * * * under a contract between said Bureau and Mars * * * and uniformly used by Mars as its shipping weights * * *"

Thus, the Circuit Court is in the position of basing *its entire decision* upon a conception which both the Respondent and the Petitioner agree *is wholly erroneous.*

If the Respondent seeks in this Court to sustain the Circuit Court's decision on this point, he will have to squarely contradict the position he took in both the District Court and the Circuit Court.

Point Eight

The Circuit Court was not authorized to enter a decree that had no basis in either the pleadings nor evidence offered by the Respondent.

Under the First Question discussed in our petition for certiorari we called attention to the fact that the Circuit Court's instructions called for the entry by the trial court of a decree that was neither sought nor authorized in the Plaintiff's pleadings.

As was pointed out, the Plaintiff sought to restrain Petitioner from selling any candy bar at prices in excess

of those established by the General Maximum Price Regulation. No mention was made in the Prayer of March weights nor of invoices, nor bills of lading. (R. 3, 4). The temporary restraining order, issued by the District Court without notice to Mars, Incorporated on the day the Complaint was filed, uses the identical language of the prayer in the Complaint. (R. 5, 6). Again there is no mention of March weights, nor of invoices nor bills of lading. (R. 5, 6). In his Brief in the Circuit Court, in the concluding paragraph, the Respondent says:

> "We respectfully submit that the * * * trial court should be instructed to enter * * * a decree pursuant to the prayer in the Administrator's complaint." (Appellant's Brief P. 58).

In disregard of these pleadings, the pattern set by the preliminary injunction, and the plea in the Appellant's Brief, the Circuit Court upon its own motion ordered the entry of a decree based upon March weights as shown upon the invoices and bills of lading used that month.

As an example of the utter impossibility of compliance with such an order, the record shows that for one type of package used, there are actually two invoice weights for the same type of shipping assortment in March of 1942. On March 2, 1942, 1 carton of 6 boxes 48 count 5¢ Double Box Assortment with a shipping weight of 54 pounds was sold to Schanker Tobacco Company by Mars, Incorporated for a price of $1.36 per box of forty-eight bars. The six such boxes contained in the carton were sold for $8.16. (R. 364). An identical transaction took place between the same parties on March 30, 1942, but on this occasion two cartons weighed only 51 pounds each, according to the invoice and bill of lading, yet the price was the same. (R. 366, 367). The explanation for the weight change is found in the fact that a new weight determination was made for the double box assortment on March 6, 1942 (R. 302). The

representative of the Western Weighing and Inspection Bureau, who made this new weight determination made a notation on the weighing record, "Change made in candy bar, also size of carton." (R. 302). But, though the change in the shipping carton weight is explained, there is no explanation as to how Mars, Incorporated can follow the Circuit Court's Order, nor obey the injunction. The Circuit Court orders that the trial Court shall. "enjoin defendant * * * from selling * * * any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March 1942, etc."

What is the highest price on the double box assortment as shown by the invoices and bills of lading during March? The price is $1.36 per box, or $8.16 per carton in all instances, but obviously the Court does not mean merely the price. If the Circuit Court means that price and weight are to be considered inversely, then does that mean that all future shipments of the double box assortment shall be at the lower weight? Unfortunately for this theory, the number of each kind of bar contained in the double box assortment was changed in March. In this method of packing the candy bars, an assortment of either five or six of the named candy bars was included with a given number of each kind in each of the six boxes. In some of the assortments "Mars" bars were included, so all six bars were assembled in these packages. In others, the other five named bars were included but "Mars" were not. This would clearly indicate an actual change in weight, since "Mars" is the lightest bar, but according to the invoices and bills of lading, some of the old assortments weighed the same as the new ones. This could not be true, yet that is what the invoices and bills of lading show. Clearly, this is an instance of using estimated shippng weights for convenience.

Since there were two such assortments in use in March, which one may Mars, Incorporated use? No guidance nor tolerance is permitted by the Court's Opinion and the resulting injunction.

Had the Plaintiff plead for such an injunction, the Defendant could have had an opportunity to show that the compliance by the Defendant would have been impossible in the ordinary manufacturing business. Presumptively, upon the showing that compliance was not possible, the injunction would not then have been ordered.

Since the injunction as finally issued was not sought in pleadings, nor considered by the parties, the Defendant had no chance to show the injury it would suffer by the entry of such an order. In ordering an injunction neither plead, proved nor sought on appeal, the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As was said in the recent case (1940) of *Drybrough* v. *Ware*, 111 F. (2d) 548:

> "The enforcement of rights and obligations in judicial procedings depends upon issues disclosed by pleadings which must be supported by evidence offered by the parties, and a decree may not be based on mere conjecture, supposition or speculation * * *."

The Tenth Circuit in *Osage Oil and Refining Company* v. *Continental Oil Company*, 34 F. (2d) 585, certiorari denied 287 U. S. 616, 53 S. Ct. 17, 77 L. Ed. 535, held:

> "Issues not raised by the pleadings cannot be determined. *U. S. vs. Goldstein* (C. C. A. 8) 271 F. 838, 845 * * *.
>
> "A decree insofar as it undertakes to decide issues not raised by the peladings is void. *Jorgenson Co. vs. Rapp* (C. C. A. 9), 157 F. 732; *Reynolds vs. Stockton*, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464 * * *.

"A Court is without jurisdiction to pass upon questions not submitted to it for decision (citing a long list of authorities)."

Other authorities to the same effect are: *Southern Railway Co.* v. *Montgomery* (C. C. A. 5), 46 F. (2d) 990; *Dubinsky* v. *Lortz* (C. C. A. 8) (decided in 1942), 129 F. (2d) 669; *Twachtman* v. *Connelly* (C. C. A. 6), 106 F. (2d) 501; *Indemnity Insurance Co.* v. *Moses* (C. C. A. 5), 36 F. (2d) 219.

In another case where the Court sought to go outside of the pleadings, it was held in *re Wesley Corporation* 18 F. Supp. 347:

"It seems clear that inability to afford the relief sought did not warrant gratuitously granting an altogether different and uncalled for relief as a substitute."

Point Nine.

The Circuit Court of Appeals was not authorized to set aside the finding of the Trial Judge that the Respondent had failed to prove his second count, to-wit, that Petitioner failed to prepare a correct statement showing the highest price charged for its commodities delivered during March, 1942.

The sole ground upon which Respondent sought to establish this allegation was that there had been no shipments during March, 1942 of candy bars of the weight shown on the Western Weighing and Inspection Bureau's weight determination of March, 1942.

As a matter of fact, Respondent admitted in the trial Court that if there had been shipments of candy bars during March, 1942 with the weight as shown in the weight determination of March 31, 1942, the suit would never have been brought.

As we have heretofore pointed out in our petition for writ of certiorari, practically all of the candy manufactured in

any given day was shipped on that day. The testimony of Respondent was that none of the bills of lading and invoices issued by Petitioner during the month of March, 1942 contained the weight determination made by the Western Weighing and Inspection Bureau on March 31, 1942.

Actually, all of the candy shipped from March 23 to March 31, 1942 was candy comparable in weight to that weighed, sold, and delivered on March 31, 1942. The testimony is undisputed that the amount of coating used on the candy bars was reduced on March 23, 1942 (R. 246). The amount of ingredient used in the candy from March 23 to March 31, 1942 was less than at any other time during that month (R. 212, 554, 555, 596). As is shown on the exhibits, the average weight of raw material that went into each twenty-four bars manufactured from March 23 to 31 was only 3.912 pounds as compared with the period of March 9 to 14 when 4.018 pounds were used (R. 554). This is graphically borne out in the visual application of these figures on a chart (555, and 596A). Conclusive proof is found in the testimony of the Petitioner's witness Pobloske (R. 185-194) and the Respondent's witness Tranker (R. 103-112).

If a weight determination had been made at any time between March 23 and March 31, obviously comparable weights to those found on March 31 would have been established. This is inescapable, since it was the reduction in the chocolate coating which took place on March 23 that caused the perceptible general average fall in the candy bar weights at that time (R. 246). But, simply because the inspector for Western Weighing and Inspection Bureau did not happen to come to Mars, Incorporated to make a weight determination until March 31, the Circuit Court has held that the weights which had actually been in effect since March 23 were not applicable. The Western Weighing and Inspection Bureau inspector, when testifying on behalf of the Respondent, says he saw the very cartons which he weighed

on March 31 actually loaded at that time in the freight car (R. 111). Pobloske says these cars were actually hauled away from the loading platform by the railroad on the morning of that day (R. 187). Pobloske testified that approximately 11,000 cartons (or 3,168,000 candy bars) were produced on March 31 (R. 188). Pobloske stated that *all* the candy shipped on March 31 was comparable in weight to that weighed by Mr. Tranker on that date (R. 188). None of this testimony was contradicted nor questioned. A part of it was introduced by the Respondent. The Respondent offered no rebuttal testimony.

Despite this clear, uncontradicted evidence, the Circuit Court declared that the trial Court's finding that the weights established on March 31 were "clearly erroneous". Instead of being based upon the record, the Circuit Court's conclusion is based upon the unsupported possibility that these shipments of approximately 11,000 cartons (3,168,000 candy bars) might have been all shipped to the Defendant's warehouses in Dallas and Newark. This Opinion was reached despite the fact that there was not one iota of testimony in the record that Mars had any warehouse at Dallas nor at Newark in March of 1942 (R. 668).

Conclusion.

By confusing a means used by the railroads for their convenience in determining freight charges on the one hand, with the pricing methods that have been long established in the piece and package goods industry, on the other hand; the Respondent has led the Circuit Court into most grievous error. The Circuit Court went further in its opinion than the Respondent asked the Court to go.

Although the Respondent is asking this Honorable Court to approve the decision of the Circuit Court, *the Respondent himself has refused to follow the Circuit Court's opinion in determining the selling price of five-cent candy bars.* This

is strikingly illustrated in an order filed by the Respondent as to another candy company's commodity, on August 6, 1943, some three months after the Circuit Court's opinion was delivered on May 7, 1943. This order determines a selling price for a new candy bar of one of Petitioner's competitors on a "count per box" basis. Weight is not considered except that the wrapper weight designation is part of the description of the bar. In this order, no mention is made of invoices, bills of lading, nor average shipping weight. The order reads in part:

> "That E. J. Brach & Sons, Chicago, Illinois, is authorized to sell to wholesalers its 5¢ retail '1¾ ounce Chocolate Pudding Bar', packed 24 to the box, at the maximum delivery price of 68 cents per box * * *." *(8 Fed. Reg. 11036).*

Here is clear evidence that Mars, Incorporated has been discriminated against. Here is an unmistakable confession that the Respondent is not willing to follow the method prescribed by the Circuit Court in fixing the selling price of 5¢ candy bars. Here is irrefutable proof that *the Respondent agrees* that the "traditional, standard, appropriate, habitual business practice" in determining the selling price of 5¢ candy bars is upon a "count per box" basis, and that *shipping average weights, invoices and bills of lading have no connection* whatsoever *with such selling* price. Either the Circuit Court in its opinion against Mars, Incorporated has ordered a change in a business practice in industry which even the Respondent finds is too violent to follow; or else, there has been a wholly unwarranted and unjustifiable prejudicial discrimination against Mars, Incorporated.

We respectfully suggest that in this case against Mars, Incorporated the Respondent and the Circuit Court in their earnest desire to enjoin the Petitioner, have moved with more zeal than discernment. We sincerely believe that upon

a review of this entire case that this Honorable Court will find that the District Court was correct in dismissing the Plaintiff's Complaint.

It is respectfully submitted that the accompanying petition for writ of certiorari should be granted.

CLAUDE R. MILLER,
Palmolive Building, Chicago, Illinois,

R. B. HOLLAND,
Gulf States Building, Dallas, Texas,

LEO B. PARKER,
Waltower Building, Kansas City, Missouri,
Counsel for Petitioner.

Of Counsel:
STRASBURGER, PRICE, HOLLAND,
KELTON & MILLER.

(8127)